NOLA GRACE PTASYNSKI

IBLA 84-129 Decided July 11, 1984

Appeal from decision of the Montana State Office, Bureau of Land Management, dismissing protest against reinstatement of oil and gas lease M-38310.

Affirmed.

1. Oil and Gas Leases: Applications: Generally -- Oil and Gas Leases: Discretion to Lease -- Oil and Gas Leases: First-Qualified Applicant -- Oil and Gas Leases: Noncompetitive Leases

   If an oil and gas lease is to be issued for a particular tract, it must be issued to the first-qualified applicant. An application filed pursuant to the simultaneous filing procedure and selected with first priority is a noncompetitive application to lease for oil and gas and does not create a property right in the applicant but is merely a hope or expectation. The Secretary of the Interior may, in his discretion, reject any application to lease for oil and gas. An application, however, may not be rejected on a basis other than that permitted by law.

2. Oil and Gas Leases: Applications: Generally -- Oil and Gas Leases: First-Qualified Applicant -- Oil and Gas Leases: Reinstatement -- Oil and Gas Leases: Termination

   The first-qualified applicant for an oil and gas lease acquires no vested right to have a lease issued to him but only a right to be preferred over other applicants if a lease is to be issued and his application may be rejected if it is determined that a previously terminated lease including the lands sought for leasing should be reinstated under sec. 401 of the Federal Oil and Gas Royalty Management Act, P.L. 97-451, 96 Stat. 2447, which amended sec. 31 of the Mineral Leasing Act of 1920, 30 U.S.C. § 188 (1982).

3. Oil and Gas Leases: Reinstatement -- Oil and Gas Leases: Termination

Sec. 401 of the Federal Oil and Gas Royalty Management Act, P.L. 97-451, 96 Stat. 2447, amending sec. 31 of the Mineral Leasing Act of 1920, 30 U.S.C. § 188 (1982), affords an additional opportunity to reinstate a lease terminated by operation of law where it is shown to the satisfaction of the Secretary that failure to timely pay the rental was inadvertent, provided certain criteria are met.

4. Oil and Gas Leases: Reinstatement -- Oil and Gas Leases: Rentals -- Oil and Gas Leases: Termination

While the assignee of an oil and gas lease may not exercise any control or dominion over the lease prior to approval of the assignment, the assignee is not precluded from paying the annual rental in an effort to avoid termination of the lease or to qualify the lease for reinstatement upon petition by the lessee of record.

APPEARANCES: Chris Mangen, Jr., Esq., Billings, Montana, for appellant; Michael F. Lamb, Esq., Great Falls, Montana, for A. K. Guthrie and Victory Land and Exploration Company.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Nola Grace Ptasynski appeals the October 14, 1983, decision of the Montana State Office, Bureau of Land Management (BLM), which dismissed her protest against reinstatement of oil and gas lease M-38310.

Lease M-38310 terminated effective December 1, 1981, for failure to timely pay rental. A. K. Guthrie is the holder of record of the lease. An application for approval of the assignment of the lease from Guthrie to Victory Land and Exploration Company (Victory) had been filed in July 1981, but it had not been approved by December 1981, and has since been returned unapproved. Rental for lease M-38310 was due on December 1, 1981, but was not submitted until December 2, 1981, by David L. Kellogg, an agent for Victory.

On January 6, 1982, BLM issued a decision denying reinstatement of the lease. Victory appealed BLM's decision to this Board. In affirming BLM's decision we stated:

> [1] An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1976); 43 CFR 3108.2-1(a). Because the rental payment was not received on December 1, 1981, the due date, the lease terminated automatically. Congress has authorized reinstatement of a terminated lease only if, among other requirements, the lessee shows

> that a failure to pay on time was either justifiable or not due to lack of reasonable diligence. 30 U.S.C. § 188(c) (1976); 43 CFR 3108.2-1(c). The petition filed by Victory does not allege that the failure to pay the rental timely was justifiable or not due to a lack of reasonable diligence on the part of Guthrie. Rather, the reasons given in the petition and this appeal relate to Victory's efforts to make timely payment.
>
> [2] In Grace Petroleum Corp., 62 IBLA 180 (1982), the Board ruled that where a proposed assignment of an oil and gas lease has not been approved by BLM and the lease has automatically terminated by operation of law for failure to pay rental timely, only the lessee who is holder of record of the lease, and not the potential assignee, may petition to have the lease reinstated on the ground that reasonable diligence was exercised or that late payment was justified. There are two statutory bases for this holding. Under 30 U.S.C. § 188(c) (1976), as noted above, a terminated lease may be reinstated only if the failure to make timely payment "was either justifiable or not due to a lack of reasonable diligence on the part of the lessee." (Emphasis added.) Furthermore, the statutory provision governing assignments, 30 U.S.C. § 187a (1976), states that until approval of an assignment, "the assignor or sublessor and his surety shall continue to be responsible for the performance of any and all obligations as if no assignment or sublease had been executed." Thus, under the holding of Grace Petroleum Corp., supra, it is not relevant whether Victory's efforts to make timely payment of the rental constituted reasonable diligence or justifiable delay. The holder of record of the lease did not file a timely petition for reinstatement, and there is no allegation that any action by Guthrie would meet the requirements for reinstating the lease. [Footnote omitted.]

Victory Land & Exploration Co., 65 IBLA 373, 374-75 (1982).

The Board's decision was, of course, final for the Department. 43 CFR 4.21(c). Upon the expiration of the 90-day statutory limitation for the filing of a suit for judicial review without action by the parties, the matter appeared to have been effectively concluded. Subsequently, BLM posted the subject lands as available for the simultaneous filing of lease applications for the March 1983 drawing. Appellant Nola Grace Ptasynski's application was among the 59 applications so filed for this parcel.

However, by enactment of section 401 of the Federal Oil and Gas Royalty Management Act (the Act), P.L. 97-451, 96 Stat. 2447 (enacted Jan. 12, 1983), which amended section 31 of the Mineral Leasing Act of 1920, 30 U.S.C. § 188 (1982), Congress had opened a new "window of opportunity" for the reinstatement of terminated lease M-38310 under different terms and conditions. 1/

1/ Section 401 of the Act sets out two categories of leases for reinstatement: leases which terminated prior to enactment of the statute and those which terminated on or after enactment. Since the lease in this case terminated effective Dec. 1, 1982, it falls into the former category. To qualify

On March 22, 1983, a day after the close of the period for the simultaneous filing of applications, but prior to the "drawing" (computer selection), Guthrie and Victory filed another petition for reinstatement of lease M-38310 pursuant to the new Act.

BLM did not act immediately on the reinstatement petition, but proceeded with the selection process to establish the priority of those who had filed simultaneous applications for the same land. Appellant Ptasynski's application was selected with first priority and was assigned serial number M-58405. 2/

By letter filed with BLM on September 19, 1983, Ptasynski noted that action on her application, M-58405, had been suspended pending a final decision on the petition to reinstate terminated lease M-38310. Appellant stated in the letter that she was protesting "against the petition to reinstate Lease, M-38310."

On October 14, 1983, BLM dismissed appellant's protest because "it is the clear intent of the [Federal Oil and Gas Royalty Management Act] that leases which terminate because of an inadvertent mistake be reinstated"; because BLM found no "clear benefit to the United States if we deny reinstatement and issue the simultaneous lease"; and because "we do not find that Ptasynski has a better right to a lease than the petitioner."

In her statement of reasons for appeal of the denial of her protest, appellant states that her application and the petition for lease reinstatement should be regarded as conflicting applications for a lease on the same lands and that her application was filed before the petition for reinstatement. Appellant acknowledges that section 401 of the Act provides the Secretary of the Interior with discretionary authority to reinstate terminated leases and that the section was meant to mitigate the harshness of automatic termination. Appellant further notes, however, that section 401 of the Act penalizes a reinstated lessee in the form of increased rentals and royalties. Appellant argues that BLM should only reinstate a terminated lease if it is shown that lease termination was so harsh as to be "unconscionable"; that she was the first-qualified applicant under 30 U.S.C. § 226 (1982); and that the fact of greater revenue being received upon a reinstatement, which greater revenue was meant to be a punishment, should not be a criteria in preferring the choice of reinstating a lease over issuing a lease to her because the penalty, in effect, operates against her. Appellant further contends that

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fn. 1 (continued)
for reinstatement of such a lease, the lessee must have tendered rental prior to Jan. 12, 1983, and the final determination that the lease terminated must have been made by the Secretary or a court less than 3 years before Jan. 12, 1983, and the lessee must file a petition for reinstatement together with the required back rental and royalty accruing from the date of termination, on or before the one hundred and twentieth day after Jan. 12, 1983.

2/ The lands covered by parcel Mt 402 for which appellant filed application are the same as the lands covered by lease M-38310. They encompass approximately 1,449 acres of land in secs. 7, 19, 21, 32 and 34, T. 7 S., R. 53 E., Principal meridian, Powder River County, Montana.

the legislative history of section 401 of the Act indicates that reinstatement is appropriate only where a lease terminated shortly before the lessee obtained production from the leasehold and that there is no evidence that such is the case here.

In an answer to appellant's statement of reasons for appeal, Victory states that, contrary to appellant's contentions, the BLM decision is not based "solely" on the increased revenues which will accrue upon reinstatement of lease M-38310, but that BLM considered the purpose and language of section 401 of the Act as well as the equities of the case in light of the facts and the financial consequences of denying or allowing reinstatement; that each of the three reasons given for dismissing the protest is adequate in and of itself as a basis to affirm the decision; and that the discretion accorded the Secretary under section 401 is necessarily very broad to effect the purposes of the Act.

[1, 2] As contended by appellant, the Mineral Leasing Act requires that Federal leases be issued to the first-qualified applicant. 30 U.S.C. § 226(c) (1982). Udall v. Tallman, 380 U.S. 1 (1965); Arnold v. Morton, 529 F.2d 1101 (9th Cir. 1976).

An applicant for Federal oil and gas leases, however, has no cognizable contract or property interest in such leases or their issuance and the Secretary of the Interior is under no requirement to issue or reject such applications. The discretion of whether or not to lease is not exercised when a mere notice is given inviting offers and delineating procedures to be followed. The fact that BLM published notice that it would receive applications does not preclude a later exercise of discretion to decline to lease and an application for lease, even though first in time or selected with first priority from among simultaneous applications, is a mere hope or expectation rather than a property right. Rowe v. United States, 464 F. Supp. 1060 (D. Alaska 1979), aff'd in part, rev'd in part on other grounds, 633 F.2d 799 (9th Cir. 1980), cert. denied, 451 U.S. 970 (1981).

An application, however, may not be rejected on a basis other than that permitted by law. Schraier v. Hickel, 419 F.2d 663 (D.C. Cir. 1969). If reinstatement of Guthrie's lease is allowed, the effect of the reinstatement would be that the lease would continue as if there had been no termination of it and appellant's application would be properly rejected based on the fact that, at law, the lands for which appellant sought to apply were, in effect, unavailable for leasing at the time her application was selected.

Further, in the decision, R. A. Keans, A-30183 (Feb. 16, 1965), which contains a similar fact situation to that discussed here, the Department stated:

> Since the preference right of an offeror gives him no vested right to a lease or an interest in the land, we perceive no constitutional limitation upon the authority of Congress to limit or revoke the exercise of the "right" prior to acceptance of the offer by the Secretary. This was the purport of the court's ruling in Haley v. Seaton [281 F.2d 620 (D.C. Cir. 1960)]. In that case the court said that the filing of an offer under the Mineral

> Leasing Act for an oil and gas lease on public land would not prevent Congress from subsequently changing the status of the land to Indian land so as to make the land subject to oil and gas leasing under a different statute, thus defeating the preference right of the first offeror. As the court stated, the first qualified applicant for an oil and gas lease acquires "no vested rights against the United States." How then can it be said that the United States, acting through Congress, cannot validly limit or terminate the preference right?

Id. at 6.

Accordingly, BLM's denial of appellant's protest is affirmed and Guthrie's petition for reinstatement must be allowed or disallowed on its own merits.

[3] As noted in the BLM decision, section 401(d)(1) of the Act provides that where any oil and gas lease terminates automatically for failure to pay rental and it is shown to the satisfaction of the Secretary that such failure was inadvertent, the Secretary may reinstate the lease. Although the legislative history discusses that situation where discovery for oil and gas was made after lease termination, the statute, as written, is not limited to such leases. The legislative history of section 401 of the Act provides, in part, as follows:

> In considering the reinstatement of a terminated lease, two separate decisions are necessary. The first has to do with whether or not the circumstances that led to the lease termination justify its reinstatement. A second decision has to do with the terms under which the lease would be reinstated. For the second decision, particularly those leases that had achieved production after the lease was terminated, it appeared necessary to have a clear indication of the value of the lease. When one is dealing with the disposal of public resources, the highest measure of stewardship must always be exercised. This is particularly so in cases where a grant of special relief is requested, such as the reinstatement of a terminated lease. Not only must the "equities" of a lessee's terminated interest be considered, but also the interest of Federal, State, and local governments, as well as the general public. [Emphasis added.]

1982 U.S. Code Cong. & Ad. News 4275.

In our view, "the equities of [Guthrie's] terminated interest" far outweigh those of appellant. Guthrie, if denied reinstatement, would lose a considerable investment and be deprived of a once vested interest, in addition to losing the benefit of his bargain with Victory. By contrast, if appellant's application is denied, all she stands to lose "is a hope, or perhaps an expectation, rather than a claim," even though her application enjoyed first priority. Schraier v. Hickel, supra, at 419 F.2d 666-67. Even her filing fee will be refunded.

Further, the newly enacted amendment under which Guthrie has petitioned for reinstatement of his terminated lease must be regarded as relief legislation. It is generally recognized that relief acts are to be liberally construed and applied in favor of those who are the intended beneficiaries of the legislation.

[4] The dissenting opinion would bar reinstatement of the lease because the rental was paid by the assignee, Victory, rather than by the lessee of record, Guthrie, while the approval of the assignment by BLM was pending. Although the statute refers to payment or tender of the rental by "the lessee," to our knowledge, neither this Board nor BLM has ever applied such a strict and literal reading of the statute as would preclude rental payments made "on behalf of the lessee," or "for the lessee." 3/ While an unapproved assignee may not exercise any control or dominion over the lease, the Department has never held that such an assignee could not pay the lease rental for the lessee of record. See, e.g., Amoco Production Co., 16 IBLA 215 (1974), where the Board noted, without objection, that the partial rental payment had been made by the unapproved assignee. In the recent case of Ladd Petroleum Corp., 70 IBLA 313 (1983), the Board expressly endorsed the right of an unapproved assignee to pay the rental due on the assigned portion of the lease. The dissent fails to demonstrate any reason for the harsh and restrictive interpretation it espouses, while we might hypothesize several reasons in support of the more liberal construction. For example, if A assigns a lease to B and then goes bankrupt while approval is pending before BLM as the rental due date approaches, should a rental tender by B be refused on the ground that only A is allowed by the statute to make the payment? We cannot agree that Congress so intended, and we can envision no purpose which would be served thereby.

Since there is no evidence that the subject lease, M-38310, is in production, we find it reasonable, under the criteria provided in the legislative history, that the terms under which the lease would be reinstated could be the minimum provided by section 401 of the Act. 4/

3/ BLM has, in fact, recently directed its personnel to receive lease rental payments from assignees while approval of the assignment is pending. BLM Instruction Memorandum No. 84-547, dated June 21, 1984.

4/ Section 401 of the Act provides in pertinent part:

"(e) Any reinstatement under subsection (d) of this section shall be made only if these conditions are met:

* * * * * * *

"(2) payment of back rentals and either the inclusion in a reinstated lease issued pursuant to the provisions of section 226(b) of this title of a requirement for future rentals at a rate of not less than $10 per acre per year, or the inclusion in a reinstated lease issued pursuant to the provisions of section 226(c) of this title of a requirement that future rentals shall be at a rate not less than $5 per acre per year, all as determined by the Secretary;

* * * * * * *

"(B) payment to back royalties and inclusion in a reinstated lease issued pursuant to the provisions of section 226(c) of this title of a requirement for future royalties at a rate not less than 16-2/3% percent:

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision dismissing appellant's protest is affirmed.

Edward W. Stuebing
Administrative Judge

I concur

Wm. Philip Horton
Chief Administrative Judge.

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fn. 4 (continued)
Provided, That royalty on such reinstated lease shall be paid on all production removed or sold from such lease subsequent to the cancellation or termination of the original lease."

ADMINISTRATIVE JUDGE IRWIN DISSENTING:

I appreciate my colleagues' exercise in quasi-equity, but I think it is improper. 30 U.S.C. § 188(d)(2)(A)(i) (1982) specifically provides that no lease shall be reinstated under subsection (d)(1), authorizing the Secretary to reinstate where failure on the part of the lessee to pay the rental before the anniversary date was "inadvertent," unless the lessee tendered the rental before the enactment of the Federal Oil and Gas Royalty Management Act. The requirement that the lessee tender rental is consistent with the provision of 30 U.S.C. § 187a (1982) that, until an assignment is approved, the assignor "shall continue to be responsible for the performance of any and all obligations." (Emphasis added.) In this case the unapproved assignee made the payment, not the lessee. 1/ It may be that Congress would prefer that leases like Guthrie's be reinstated, but, if so, that is properly a matter for it to do, either by amending the language of subsection (d)(2) to cover circumstances such as these or by enacting private legislation. 2/ It is not for this Board to do because it thinks it is a reasonable result and the drafting of the Act was itself inadvertent. 3/ It is not our proper function to ignore or rewrite such plain language.

1/ See check number 582, dated Dec. 1, 1981 (sic), payable to BLM for $1,449, drawn on the Stockmens Bank and Trust Company of Gillette, Wyoming, for "Rental paym. for Fed. Lse. M38310," by David L. Kellogg, on which is written, after Kellogg's imprinted name, "agent for Victory Land and Exploration Co." See also Petition for Reinstatement of M-35310 (sic), dated Dec. 19, 1981, from Victory Land and Exploration Company, which reads in part: "[A]n agent for Victory, Land and Exploration Company was immediately dispatched to Billings, Montana, arriving shortly after 5:00 pm. Upon the opening of the BLM, December 2nd, 1981, 8:00 am, our agent presented a new check for the full amount of $1449.00." See also statement of reasons in IBLA 82-444, filed Mar. 1, 1982, paragraphs 6 and 7, and accompanying affidavits of David L. Kellogg, reading in part, "I, David L. Kellogg, * * * deposes and says: 1. He is, and has been at all times relevant hereto, an agent for Victory Land Exploration Company," and of H. Gregory Pearson, an officer of Victory, reading in part, in paragraph 8, that "he directed David L. Kellogg, Victory's agent, to make payment of the December, 1981, delay rental * * *." In the face of all these statements, the assertion in paragraph 23 of the second petition for reinstatement, filed Mar. 22, 1983 (and in paragraph 12 of the answer filed Jan. 5, 1984), that "[o]n the morning of December 2, 1981, David L. Kellogg, on behalf of Guthrie and Victory, paid the delay rental of $1449.00 for Federal Lease M 38310 with his personal check No. 582" is simply not credible. (Emphasis added.)

2/ I am aware that a principal motive of the Congress in enacting the Federal Oil and Gas Royalty Management Act was to reduce the number of private relief bills for lease reinstatement it must consider. It apparently did not intend to entrust the Secretary with discretion to reinstate leases for people in Guthrie's situation, however.

3/ I respect the counsel that courts should make allowances for human error and inadvertence in legislative drafting when they construe ambiguous or inconsistent provisions of a statute, Citizens To Save Spencer City v. U.S. Environmental Protection Agency, 600 F.2d 844, 870-72 (D.C. Cir. 1979), but I do not think it is applicable in this case. The legislative history of

One other aspect of BLM's decision warrants correction, in my view. The decision reads in part:

> When considering a reinstatement, the FOGRMA says it is necessary to have a clear indication of the value of the land. Not only must the "equities" of a lessee's terminated interest be considered, but also the interest of Federal, State, and local government, as well as the general public.
>
> It is, therefore, necessary for us to consider the revenues involved in the reinstatement of this lease. There are the benefits of additional rental and additional royalties if the reinstated lease should go into production. On the other hand, we would need to refund $4,425.00 in filing fees involved in parcel MT 402 of the March 1983 simultaneous filing period. If the reinstatement is denied the filing fees would be retained but when the lease issued we would only receive $1.00 per acre per year instead of $5.00, and only 12-1/2% royalty instead of 16-2/3% if the lease went into production.

The first paragraph quoted above is based not on the language of the Act but of House of Representatives Report 97-859, which stated in part:

> In considering the reinstatement of a terminated lease, two separate decisions are necessary. The first has to do with whether or not the circumstances that led to the lease termination justify its reinstatement. A second decision has to do with the terms under which the lease would be reinstated. For the second decision, particularly those leases that had achieved production after the lease was terminated, it appeared necessary to have a clear indication of the value of the lease. When one is dealing with the disposal of public resources, the highest measure of stewardship must always be exercised. This is particularly so in cases where a grant of special relief is requested, such as the reinstatement of a terminated lease. Not only must the "equities" of a lessee's terminated interest be considered, but also the interest of Federal, State and local governments, as well as the general public.
>
> In order for the Committee to fully and adequately consider the equities of all interests involved, and not legislate

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fn. 3 (continued)
the Federal Oil and Gas Royalty Management Act does not indicate it was patched together hurriedly from conflicting language of differing bills. Cf. Utah Wilderness Association, 80 IBLA 64, 73, 91 I.D. 165, 171 (1984). I conclude that it was intended that subsection (d)(2)(A)(i) specifies that a lessee whose lease terminated before the Act was passed should tender the rental before that date but subsection (d)(2)(B) does not so specify for a lease terminated after that date, presumably to maintain the lessee-assignor responsibility set forth in 30 U.S.C. § 187a (1982) with regard to tender until after enactment.

> "blindfolded," questions as to value of the terminated leases now pending before the Committee were raised with both the Secretary of the Interior and some of the former lessees. Difficulty and long delays were encountered in obtaining this information from the Department of the Interior. Delays were also encountered in getting information on value from some of the lessees whose terminated leases are now in production.
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> Because of these problems and others concerning reinstatement, a more viable course appeared to be a generic bill which would set minimum rentals and royalties for the reinstatement of terminated leases, and grant the Secretary of the Interior authority, at his discretion, to reinstate those leases under certain minimum conditions.

H.R. Rep. No. 859, 97th Cong., 2d Sess. 22, reprinted in 1982 U.S. Code Cong. & Ad. News 4276.

It is clear from this discussion that the question of what terms governing rentals and royalties would be applicable to a reinstated lease was a policy issue for the Congress distinct from "whether or not the circumstances that led to the lease termination justify its reinstatement." The "certain minimum conditions" that authorize reinstatement in the discretion of the Secretary are clearly set forth in the Act. If they are met, the rental and royalty rates determined by Congress apply. It is up to BLM to determine whether the circumstances and conditions are met. That determination should not be colored by the prospect of increased revenues, however, as it apparently was in this case.

Will A. Irwin
Administrative Judge

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